Ambiguous Invocations of the Right to Remain Silent: A Post-*Davis* Analysis and Proposal

Wayne D. Holly[*]

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[1]

INTRODUCTION

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[2] This privilege against self-incrimination is guaranteed to state criminal defendants through the Due Process Clause of the Fourteenth Amendment.[3] In the context of custodial police interrogation, the Fifth Amendment privilege confers two separate and distinct substantive rights designed to protect suspects from the inherently coercive atmosphere of the police-dominated setting.[4] Once in custody[5] and prior to being interro-

---

[*] B.A., Rhode Island College, 1993 (*magna cum laude*); J.D., New York Law School, 1996. Mr. Holly is a member of the Criminal Justice Section of the New York State Bar Association and the American Bar Association's Business Bankruptcy Section's Subcommittee on Bankruptcy Crimes and Abuses of Bankruptcy Process. He was the 1996 recipient of the Professor Vincent LoLordo Award for Excellence in Administration of Criminal Justice and has authored numerous articles on federal criminal law and procedure. He is currently an associate with the New York law firm of Tracy L. Klestadt & Associates. The editorial assistance of Tracy L. Klestadt is gratefully acknowledged.

[1] Coppedge v. United States, 369 U.S. 438, 449 (1962).

[2] U.S. CONST. amend. V.

[3] *See* U.S. CONST. amend. XIV; Malloy v. Hogan, 378 U.S. 1, 3 (1964).

[4] *See* Miranda v. Arizona, 384 U.S. 436, 448-68 (1966) (extensively describing the "inherent pressures of the interrogation atmosphere").

[5] The starting point for custody determinations is *Miranda*, which indicated that an individual is in "custody" when he is "deprived of his freedom of action in any

gated,[6] suspects must be advised, among other things, of their right to remain silent and their right to counsel, either retained or appointed.[7] These rights, and the procedural safeguards designed to preserve them, are indispensable to ensuring that inherently compelling pressures do not "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely."[8] Once a suspect invokes the right to silence, police questioning must immediately cease and the suspect's decision must be "scrupulously honored."[9] Any statement thereafter obtained from the individual will be presumed coerced unless the suspect knowingly, voluntarily, and intelligently waived his previously invoked right to silence.[10]

Likewise, where an accused indicates to police that he wishes to have the assistance of counsel, no further interrogation is permissible until either counsel is present,[11] or the individual "initiates" conversation with the police and thereafter knowingly, voluntarily, and intel-

---

significant way." *Miranda*, 384 U.S. at 444. Ultimately, the inquiry is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). Courts should consider "how a reasonable [person] in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

[6] The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1979), the Court held that "interrogation" refers "not only to express questioning, but also to any words or action on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*

[7] *See Miranda*, 384 U.S. at 467-73, 479. Summarizing its holding, the *Miranda* Court stated:

> [U]nless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored . . . , [the suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

[8] *Id.* at 467; *see* United States v. Ramirez, 79 F.3d 298, 304 (2d Cir. 1996) ("*Miranda* warnings are intended principally to safeguard the suspect's privilege against self-incrimination.").

[9] *See* Michigan v. Mosley, 423 U.S. 96, 104 (1975); *Miranda*, 384 U.S. at 479.

[10] *See* Edwards v. Arizona, 451 U.S. 477, 483 (1981); Oregon v. Bradshaw, 462 U.S. 1039, 1044-46 (1983) (plurality opinion).

[11] *See Miranda*, 384 U.S. at 474. *See generally* Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988).

ligently waives his right to have an attorney present.[12] Under federal law, the government bears the burden of proving a knowing, voluntary, and intelligent waiver by a preponderance of the evidence.[13]

The Fifth Amendment rights to remain silent and to the presence of counsel during custodial police interrogation are unique in that, like few others, they must first be *invoked* before being exercised.[14] Thus, while complicated threshold issues such as (i) whether an individual is "in custody";[15] (ii) whether police words or actions constitute "interrogation";[16] and even (iii) whether the individual

---

[12] *See Roberson*, 486 U.S. at 680-81, 684; *Bradshaw*, 462 U.S. at 1045; *Edwards*, 451 U.S. at 485.

[13] *See* Colorado v. Connelly, 479 U.S. 157, 168-69 (1986); United States v. Roman-Zarate, 115 F.3d 778, 782 (10th Cir. 1997); United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991). Some states require, as a matter of state constitutional law, that the government prove a knowing, voluntary, and intelligent waiver beyond a reasonable doubt. *See generally* State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986).

[14] The Fifth Amendment protects against *compelled* self-incrimination. It does not preclude an individual from volunteering statements that may be incriminatory. *See Miranda*, 384 U.S. at 478. "If, therefore, [an individual] desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (quoting United States v. Monia, 317 U.S. 424, 427 (1943)) (footnote omitted); *see* Smith v. United States, 337 U.S. 137, 150 (1949) (noting that "the privilege against self-incrimination must be claimed"). For this reason, the Supreme Court has long recognized that the privilege against self-incrimination "generally is not self-executing." *Murphy*, 465 U.S. at 425. An exception, however, has been recognized in the context of custodial police interrogation where it is well settled that a waiver will not be found from silence alone, but rather must be shown to have been knowingly, voluntarily, and intelligently made. *See id.* at 429-30; *Miranda*, 384 U.S. at 475; North Carolina v. Butler, 441 U.S. 369, 373 (1979). However, it is equally well-settled that both the *Miranda* right to counsel and right to silence must affirmatively be invoked in order to gain the protection of the respective procedural safeguards erected to protect those dual rights. *See* Michigan v. Mosley, 423 U.S. 96, 101-04 (1975) (recognizing that an accused must invoke the right to remain silent in order to "cut off questioning"); Towne v. Dugger, 899 F.2d 1104, 1107 (11th Cir. 1990) ("[T]he threshold inquiry with regard to the waiver of the right to counsel is whether the right to counsel was in fact invoked."); United States v. Gotay, 844 F.2d 971, 974 (2d Cir. 1988) ("[T]he [*Miranda*] right to counsel must be 'specifically invoked'[.]"). Moreover, in many cases, the issue for decision is whether a suspect's behavior, after having previously waived his *Miranda* rights, is sufficiently clear to re-invoke them. Thus, while the bare privilege itself may not need to be claimed in the context of custodial interrogation, since invocation is required to trigger all of the procedural safeguards essential to effectuate the privilege, invocation plays a crucial role in custodial interrogation jurisprudence. *See* State v. Green, 655 So. 2d 272, 280 n.8 (La. 1995) ("When *Miranda* protections are not specifically invoked . . . police may continue questioning the suspect in the hope of obtaining a statement . . . ."); *see also infra* Part II.A.

[15] *See supra* note 5.

[16] *See supra* note 6.

knows that he is speaking to an agent of the government[17] will determine whether the rights "attached" in the particular context, an equally fundamental issue asks whether a custodially interrogated suspect even invoked his rights as a condition precedent to their exercise.[18] The degree of clarity with which a suspect must invoke his Fifth Amendment rights has been the subject of considerable disagreement among the federal circuits — until relatively recently.[19] In *Davis v. United States*,[20] the United States Supreme Court considered whether the statement "[m]aybe I should talk to a lawyer" was sufficient to invoke a suspect's right to counsel, when uttered approximately 90 minutes into a Naval Investigative Service (NIS) interrogation in connection with the beating death of a sailor, where the suspect had earlier waived his *Miranda* rights.[21] Answering the question in the negative, the Court held that an equivocal or ambiguous request for counsel[22] is insufficient to invoke the right to counsel and does not require law enforcement officers to cease the interrogation nor limit further questions to those seeking clarification.[23] Since

---

[17] In *Illinois v. Perkins*, 496 U.S. 292, 294 (1990), the Court held that *Miranda* warnings are not required where the custodial suspect is unaware that the person to whom he is speaking is a law enforcement officer. *See id.*

[18] *See* Smith v. Illinois, 469 U.S. 91, 95 (1984) (noting that courts "must determine whether the accused actually invoked his right to counsel."); *Mosley*, 423 U.S. at 101-04 (stating that invocation of the right to remain silent is a condition precedent to cutting off police questioning).

[19] Prior to the United States Supreme Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), a tripartite split of authority existed among the state and federal courts regarding whether an ambiguous or equivocal reference to an attorney was sufficient to invoke the *Miranda* right to counsel. *See* Jane M. Faulkner, Case Note, *So You Kinda, Sorta, Think You Might Need a Lawyer?: Ambiguous Requests for Counsel After* Davis v. United States, 49 ARK. L. REV. 275, 282 (1996). The three approaches have commonly been referred to as (1) the "threshold-of-clarity" approach, (2) the "per se invocation" approach, and (3) the "clarification" approach. *Id.*; *see Davis*, 512 U.S. at 456 (quoting lower court's description of the three approaches); United States v. Davis, 36 M.J. 337, 341 (C.M.A. 1993).

[20] 512 U.S. 452 (1994).

[21] *Id.* at 454-55; *see* Miranda v. Arizona, 384 U.S. 436, 467-73, 479 (1966).

[22] During oral argument, the Court questioned whether a distinction should be made between ambiguous and equivocal statements. *See* Transcript of Oral Argument at 35-36, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949). Ultimately, the Court drew no such distinction in its opinion. *See generally Davis*, 512 U.S. 452 (1994). This Article will use the terms "ambiguous" and "equivocal" interchangeably.

[23] *See Davis*, 512 U.S. at 459. Though not required, the Court noted that "it will often be good police practice" for police officers to clarify a suspect's ambiguous statement. *Id.* at 461. A four-Justice concurrence expressed the view that "when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators' questions should be confined to verifying whether

Davis, the lower federal courts that have considered the question have either assumed *Davis* governs ambiguous invocations of the right to silence as well, or have specifically so held — with little or no independent analysis.[24]

---

the individual meant to ask for a lawyer." *Id.* at 476 (Souter, J., concurring).

[24] The Eleventh Circuit was the first to apply *Davis* in the right to remain silent context. *See* Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994); *see also* United States v. Mikell, 102 F.3d 470, 476 (11th Cir. 1996); Medina v. Singletary, 59 F.3d 1095, 1100-01 & n.2 (11th Cir. 1995); Irwin v. Singletary, 882 F. Supp. 1036, 1041 (M.D. Fla. 1995). Since then, the Seventh and Eighth Circuits, and the Court of Military Appeals, have either held or clearly indicated that *Davis* governs in the right-to-silence context. *See* United States v. Banks, 78 F.3d 1190, 1197-98 (7th Cir. 1996), *vacated sub nom.*, Mills v. United States, 117 S. Ct. 478 (1996), *on remand*, 122 F.3d 346 (7th Cir. 1997), *cert. denied sub nom.*, Dunlap v. United States, 117 S. Ct. 486 (1997); United States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995) (though relying heavily on pre-*Davis* circuit law); United States v. Lincoln, 42 M.J. 315, 320 (C.M.A. 1995). District courts in the First, Second, Sixth, and Tenth Circuits have so held with no circuit court decisions on the issue. *See* United States v. Andrade, 925 F. Supp. 71, 79 (D. Mass. 1996); United States v. Maisonneuve, 950 F. Supp. 1280, 1285 (D. Vt. 1996); United States v. Ramirez, 79 F.3d 298, 305 (2d Cir. 1996) (assuming without deciding that *Davis* applied), *cert. denied*, 117 S. Ct. 140 (1996); United States v. Hicks, 967 F. Supp. 242, 250 (E.D. Mich. 1997); United States v. Sanchez, 866 F. Supp. 1542, 1558-59 (D. Kan. 1994). The U.S. District Court for the District of Nevada predicted that the Ninth Circuit would apply *Davis* in the right-to-silence context, but the Ninth Circuit has recently identified the issue as an open one. *See* Evans v. Demosthenes, 902 F. Supp. 1253, 1258-59 (D. Nev. 1995), *aff'd*, 98 F.3d 1174 (9th Cir. 1996); United States v. Soliz, 129 F.3d 499, 504 n.3 (9th Cir. 1997). The Third, Fourth, Fifth and District of Columbia Circuits have also not decided the issue in a reported decision.

At the state level, the results are predictably more diverse. The courts (though not necessarily through the state's highest court) of Arkansas, Florida, Minnesota, New York, Texas, Utah, Vermont, Virginia, and Wisconsin have extended *Davis* to the right to silence. *See* Bowen v. State, 911 S.W.2d 555, 565 (Ark. 1995) (applying federal law), *cert. denied*, 517 U.S. 1226 (1996); State v. Owen, 696 So. 2d 715, 718-19 (Fla. 1997) (applying state law); State v. Williams, 535 N.W.2d 277, 284-85 & n.3 (Minn. 1995) (based in part on prior state case law); People v. Cohen, 226 A.D.2d 903, 904 (N.Y. App. Div. 1996); Dowthitt v. State, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996); State v. Levya, 951 P.2d 738, 743 (Utah 1997) (holding *Davis* applicable only after waiver and not specifically addressing whether applicable to postwaiver ambiguous indications of right to silence); State v. Bacon, 658 A.2d 54, 65 (Vt. 1995) (applying federal law), *cert. denied*, 516 U.S. 837 (1995); Midkiff v. Commonwealth, 462 S.E.2d 112, 116 (Va. 1995) (relying on prior state case law and stating that "we decline to read *Miranda* so narrowly as to compel police interrogators to accept any statement, no matter how equivocal, as an invocation of the right to remain silent"); State v. Ross, 552 N.W.2d 428, 431-33 (Wis. Ct. App. 1996) (applying state law).

The Supreme Court of Arizona has specifically rejected the extension of *Davis* to the right-to-silence context. *See* State v. Strayhand, 911 P.2d 577, 592 (Ariz. 1995) (as a matter of state law). The state supreme courts of Hawaii and New Jersey have rejected *Davis* as a matter of state constitutional law, State v. Hoey, 881 P.2d 504, 524 (Haw. 1994); State v. Chew, 150 N.J. 30, 63, 695 A.2d 1301, 1318 (1997), as had the Court of Appeal of Florida, until the decision was withdrawn. *See* Kipp v. State, 668 So. 2d 214, 215 (Fla. Dist. Ct. App. 1996); *see also* State v. Owen, 696 So. 2d 715 (Fla. 1997). The Supreme Court of West Virginia has not expressly rejected *Davis* but has

This Article will examine the appropriate degree of clarity with which a custodial suspect must invoke the right to remain silent and consider whether the Supreme Court's decision in *Davis* supplies the governing standard. Part I briefly reviews the *Davis* opinion — with particular emphasis on the reasoning which led the Court to its decision. Parts II and III then separately analyze distinct aspects of essentially a single question — whether the principles enunciated in *Davis* should be held to govern ambiguous invocations of the right to silence. Part II examines the jurisprudential differences between the Fifth Amendment right to counsel and right to silence while Part III discusses substantive and practical differences between the two rights. Together, Parts II and III conclude that these differences, in light of the express rationale of *Davis*, suggest the inappropriateness of a uniform standard to govern each right. Building on the prior analysis, the Article culminates in Part IV, which proposes both a definitional and working clarification model to govern ambiguous invocations of the right to remain silent. Part IV additionally considers arguments in favor of and against clarification and develops responsive guidelines for effective implementation of the proposal.

I. EQUIVOCAL INVOCATIONS OF THE RIGHT TO COUNSEL: *DAVIS V. UNITED STATES*

In *Davis v. United States*,[25] following the beating death of a sailor on the Charleston Naval Base, an NIS investigation led agents to suspect that the defendant Robert Davis had committed the crime.[26] Approximately one month after the sailor's death, Davis was taken into custody at the NIS office and advised of his rights consistent with *Miranda*.[27] After waiving effectuation of those rights, both orally and in writing, approximately one and one-half hours into the questioning, Davis stated, "Maybe I should talk to a lawyer."[28] According to

refused to adopt it into its state law. *See* State v. Farley, 452 S.E.2d 50, 59 & n.12 (W. Va. 1994) (noting that clarification of ambiguous invocations of the right to silence is more consistent with *Miranda* than *Davis* and refusing to adopt *Davis*).

The state or territorial courts of Alabama, Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, and Wyoming have not rendered a published decision on the issue.

[25] 512 U.S. 452 (1994).

[26] *See id.* at 454.

[27] *See id.*; Uniform Code of Military Justice Art. 31, 10 U.S.C. § 831 (1994); *see also* MIL. R. EVID. 305.

[28] The terms "questioning," "interview," and "interrogation" are used inter-

the uncontradicted testimony of one of the interviewing agents, the agents then sought to clarify whether Davis was asking for a lawyer, to which Davis responded that he was not asking for a lawyer and did not want a lawyer.[29] Following a short break, Davis was reminded of his *Miranda* rights and the interrogation proceeded for approximately another hour until Davis said, "I think I want a lawyer before I say anything else."[30] The agents then ceased the interrogation.[31]

At his general court-martial, the defendant's motion to suppress statements made during the course of the interrogation was denied on the ground that his statement, "Maybe I should talk to a lawyer," was insufficiently clear to invoke his right to counsel, and thus the NIS agents acted properly in clarifying the statement and proceeding with the interview.[32] Davis was convicted of unpremeditated murder, sentenced to life imprisonment and dishonorably discharged.[33] The Navy-Marine Corps Court of Military Review affirmed, as did the United States Court of Military Appeals.[34] The Supreme Court granted certiorari to address the degree of clarity with which a suspect must speak in order to invoke the *Miranda* right to counsel and how law enforcement officers should respond to ambiguous references to an attorney.[35]

Writing for the majority, Justice O'Connor began by reaffirming the rule of *Edwards v. Arizona*[36] and its progeny: Once a suspect indicates a desire to deal with police only through counsel, police questioning must immediately cease until either counsel is present or the accused initiates conversation with the police.[37] Focusing the issue, the Court then observed that applicability of the *Edwards* rule necessarily depends on whether the accused invoked the right to counsel.[38]

---

changeably throughout this article to mean "interrogation" as defined in *Miranda* and its progeny. *See supra* note 6.

[29] *See Davis*, 512 U.S. at 455.

[30] *Id.*

[31] *See id.*

[32] *Id.*

[33] *See id.*; *see also* Uniform Code of Military Justice Art. 118, 10 U.S.C. § 918 (1994). In addition, Davis was required to forfeit all pay and allowances and was reduced in rank to the lowest pay grade. *See Davis*, 512 U.S. at 455.

[34] *See id.* at 455-56; United States v. Davis, 36 M.J. 337 (C.M.A. 1993).

[35] *See Davis*, 512 U.S. at 456 ("Although we have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation . . . we have not addressed the issue on the merits. We granted certiorari . . . to do so.") (citations omitted).

[36] 451 U.S. 477 (1981).

[37] *See Davis*, 512 U.S. at 458; *Edwards*, 451 U.S. at 484-85; *see also* Minnick v. Mississippi, 498 U.S. 146, 151-52 (1990).

[38] *See Davis*, 512 U.S. at 458.

The inquiry is an "objective one," which asks whether the suspect, "'at a minimum, [made] some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'"[39] Thus, the Court held, to invoke the right to counsel, an accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for an attorney."[40]

Reasoning from *Edwards*, the Court explained that requiring officers immediately to cease questioning when they do not reasonably know whether the suspect desires to have counsel present, "'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,'"[41] because in some instances, an ambiguous reference to an attorney will be made by suspects who do not actually desire counsel's presence.[42] Such a rule would thus prevent the interrogation of suspects in the absence of an attorney even when a suspect actually consents to speak without a lawyer.[43]

Moreover, according to the Court, the need for effective law enforcement requires a bright line rule with ease of application.[44] The *Edwards* rule of immediate cessation of questioning upon invocation of the right to counsel "provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information."[45] Requiring an in-

---

[39] *Id.* at 458-59 (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

[40] *Id.* at 459.

[41] *Id.* at 460 (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)).

[42] *See id.*

[43] The Court's reasoning in this regard is seriously flawed in light of the numerous cases that permit an adequately warned, though willing, suspect to "initiate" conversation with the police and thereby lift the *Edwards* bar to reinterrogation. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that if a suspect requests counsel at any time during custodial interrogation, questioning must immediately cease until an attorney is present *or the accused reinitiates conversation*). *See also* Reply Brief at 11, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (arguing that "[a] suspect who does not wish to invoke the right to counsel, but whose interrogation the police halt after an ambiguous statement that could reasonably be considered a request for counsel, is free to refuse any offer of counsel or to reinitiate questioning").

[44] *See Davis*, 512 U.S. at 461.

[45] *Id.* Remarkably, in attempting to leave the *Edwards* rule undisturbed for "officers in the real world of investigation and interrogation," the Court rejected the approach to ambiguous counsel references urged by *amici curiae* Americans for Effective Law Enforcement, Inc., International Association of Chiefs of Police, Inc., The National District Attorneys Association, Inc., and The National Sheriffs' Association. *See* Brief Amici Curiae of Americans for Effective Law Enforcement, Inc., Joined by International Association of Chiefs of Police, Inc., The National District Attorneys Association, Inc., and The National Sheriffs' Association, In Support of the

terrogation to cease upon an ambiguous reference to an attorney would require law enforcement officers to make difficult interpretive judgments about a suspect's wishes "with the threat of suppression if they guess wrong."[46] Thus, while it may be good police practice to ask clarifying questions, officers are not required to cease an interrogation until a suspect clearly requests an attorney.[47]

As with most decisions, the effect of *Davis*'s holding will depend upon the level of specificity at which it is stated.[48] While, by its terms, *Davis* is inapplicable to ambiguous invocations of the right to remain silent, the full reach of the opinion must be determined by reference to both its text and rationale.[49] A sterile extension of *Davis*, without thoroughly consulting these interpretive guides, is not only an unseemly abandonment of judicial responsibility, but also an unjustifiable official imprimatur upon a needlessly abusive interrogation practice,[50] a practice designed to capitalize knowingly upon the fear, intimidation, and linguistic limitations that render many individuals unable to invoke "clearly" their rights.[51]

Respondent, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949); *see also* 512 U.S. at 466-67 n.2 (Souter, J., concurring).

[46] *Davis*, 512 U.S. at 461.

[47] *See id.* at 461-62.

[48] *Compare* United States v. Andrade, 925 F. Supp. 71, 79 (D. Mass. 1996) ("*Davis* addressed the question of how courts are to determine whether a person in custody has invoked his right to counsel such that questioning of him must cease in accordance with the principle established in *Edwards* . . . ."), *with* United States v. Maisonneuve, 950 F. Supp. 1280, 1285 (D. Vt. 1996) ("In *Davis* . . . the Supreme Court addressed equivocal assertions of Fifth Amendment rights during custodial interrogation.") (citation omitted).

[49] Several courts have recognized that *Davis* does not explicitly govern right-to-silence cases. *See, e.g.*, Evans v. Domosthenes, 902 F. Supp. 1253, 1258 (D. Nev. 1995) (recognizing that "under *Davis* . . . , the right to counsel must be invoked unambiguously, . . . it is not clear whether the same is true of the right to remain silent") (citation and footnote omitted), *aff'd*, 98 F.3d 1174 (9th Cir. 1996); State v. Strayhand, 911 P.2d 577, 592 (Ariz. 1995) (stating that "*Davis* did not deal with the Fifth Amendment guarantee against self incrimination . . ." and rejecting *Davis* in the right-to-silence context).

[50] See *infra* Part IV for an alternative approach to ambiguous invocations of the right to silence.

[51] *Cf.* Brief for the Respondent at 14, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (stating that if police officers "continue interrogating a suspect, despite an ambiguous reference to counsel, they may be overriding the suspect's desire to have counsel present simply because he has not made the request with sufficient precision"). As Justice Souter observed in his concurring opinion in *Davis*, the "margin of difference" between the *Davis* rule and one requiring clarification of ambiguities is defined by those instances in which clarifying questions would reveal that a suspect actually intended to invoke his right. *Davis*, 512 U.S. at 474 (Souter, J., concurring). In this light, the *Davis* rule seems to rest on what Justice Brennan has analogously termed "a fear of too much justice." McClesky v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (criticizing the majority's concern that accep-

II. AMBIGUOUS INVOCATIONS OF THE RIGHT TO REMAIN SILENT: WHETHER TO APPLY *DAVIS*

Developing an appropriate approach to ambiguous or equivocal invocations of the right to silence presupposes the disutility of the *Davis* rule in this area of law. Yet, where the need for clarity is essential to guide law enforcement, and where substantive rights may be lost in legal complexities, the appropriateness of developing new rules must be justified, not merely presupposed.[52] This Part will, therefore, analyze the propriety of departing from the *Davis* standard and determine whether the *Davis* approach, while not developed in the right-to-silence context, may nonetheless be effectively utilized in this area of the law as well.

A. Custodial Police Interrogation Jurisprudence

Since *Miranda* was decided in 1966, the Supreme Court has had numerous occasions to develop the contours of the dual rights enunciated in that decision.[53] In a series of cases, the Court has refined the critical distinction between the right to counsel and the right to remain silent.[54] In so doing, the Court has expressly eschewed the development of symmetrical standards to govern each right when necessary to give effect to their distinct natures and purposes.[55]

---

tance of the petitioner's racial bias evidence in imposing death penalty would "open the door to widespread challenges to all aspects of criminal sentencing").

[52] *See* Arizona v. Roberson, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (observing that "the rule of *Edwards* [and *Mosley* are] our rule[s], not a constitutional command; and it is our obligation to justify [their] expansion").

[53] Among the many interpretive and definitional issues with which the Court has grappled since its *Miranda* decision are (i) the definition of "custody"; *see generally* Berkemer v. McCarty, 468 U.S. 420 (1984); Minnesota v. Murphy, 465 U.S. 420 (1984); California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968); (ii) the definition of "interrogation"; *see generally* Pennsylvania v. Muniz, 496 U.S. 582 (1990); Arizona v. Mauro, 481 U.S. 520 (1987); Rhode Island v. Innis, 446 U.S. 291 (1980); (iii) whether a suspect has "reinitiated" conversation with the police after invoking his *Miranda* rights; *see generally* Oregon v. Bradshaw, 462 U.S. 1039 (1983); and (iv) the meaning of "scrupulously honoring" the right to remain silent; *see generally* Michigan v. Mosley, 423 U.S. 96 (1975).

[54] *See infra* Parts II.A.1 and II.A.2.

[55] The distinction was first made in *Miranda* itself, which stated that if the accused "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," Miranda v. Arizona, 384 U.S. 436, 473 (1966), and continued, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474; *see also Mosley*, 423 U.S. at 104 n.10 (recognizing that *Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney"). The Court has extended its practice of defining legal principles in relation to

These distinctions make clear that the right to counsel and the right to silence do not require identical treatment or analysis.

1. Police Interrogation and the Right to Remain Silent

In *Michigan v. Mosley*,[56] the Court addressed a question left open by *Miranda*: whether and under what circumstances a custodial suspect may be re-questioned at the initiation of police officers after he has invoked his right to remain silent.[57] In *Mosley*, a robbery suspect was arrested and taken to a police precinct where he was then advised of his *Miranda* rights and completed a rights notification certificate.[58] In response to custodial interrogation, the suspect stated that he did not want to talk about the robberies and the interrogation immediately ceased.[59] The suspect was then brought to a cell block.[60] Approximately two hours later, the suspect was moved from the cell block for further questioning by a different officer regarding an unrelated murder.[61] Following a fresh set of *Miranda* warnings, and after again signing a rights notification form, the suspect made several statements that implicated him in the unrelated murder.[62] The statements were introduced at trial following denial of a suppression motion.[63] The defendant was convicted of first degree murder and sentenced to a mandatory term of life imprisonment.[64] The Supreme Court eventually granted certiorari "because of the important constitutional question presented."[65]

---

the purpose sought to be achieved beyond the context of the Fifth Amendment privilege. *See* Minnesota v. Murphy, 465 U.S. 420, 430-31 (1984) (recognizing that "custody" for *Miranda* purposes is significantly more narrow than "custody" for federal habeas corpus purposes). *See also* Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1979) (commenting that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments . . . are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.").

[56] 423 U.S. 96 (1975).

[57] *See id.* at 101. The *Mosley* court observed that "[*Miranda*] states that 'the interrogation must cease' when the person in custody indicates that 'he wishes to remain silent.' It does not state under what circumstances, if any, a resumption of questioning is permissible." *Id.* (quoting *Miranda*, 384 U.S. at 474); *see also id.* at 109 (White, J., concurring) (commenting that "the statement in *Miranda* . . . requiring interrogation to cease after an assertion of the 'right to silence' tells us nothing because it does not indicate how soon this interrogation may resume").

[58] *See id.* at 97.

[59] *See id.*

[60] *See id.*

[61] *See id.* at 97-98.

[62] *See Mosley*, 423 U.S. at 98.

[63] *See id.* at 99.

[64] *See id.*

[65] *Id.* (describing the procedural history of the case).

The Court first noted that, under *Miranda*, a suspect's right to terminate custodial interrogation by invoking the right to remain silent does not, absent a request for counsel, indefinitely proscribe further questioning by any police officer on any subject.[66] Rather, the Court held that police may resume questioning if the right to remain silent is "scrupulously honored."[67] In light of these principles, the Court further held that no violation of the right to remain silent occurred when a robbery suspect, in response to custodial interrogation, stated that he did not want to talk about the robberies, but was approached by a second officer approximately two hours later, who again advised the suspect of his *Miranda* rights and questioned the suspect about an unrelated murder.[68] While the precise test for "scrupulously honoring" the right to remain silent continues to be the subject of litigation in the lower federal courts,[69] it is settled law that the police are not prohibited from resuming interrogation of a suspect who has once invoked his right to silence.[70]

2. Police Interrogation and the Right to Counsel

In contrast to *Mosley* and the right to remain silent, an accused's invocation of the right to counsel triggers significantly different procedural safeguards. In *Edwards v. Arizona*,[71] the Supreme Court considered whether, and under what circumstances, an accused who has invoked his right to counsel in response to custodial interrogation, may thereafter waive that right while still in custody.[72] The Court first observed that a waiver will not be established merely by showing that the accused responded to police questioning.[73] Rather, the Court held, having invoked the right to counsel, any subsequent statements obtained from the accused will be presumed coerced unless the suspect "initiated" conversation with the police and thereafter know-

---

[66] *See id.* at 102-03.

[67] *See id.* at 103-04.

[68] *See Mosley*, 423 U.S. at 104-05.

[69] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 344 (2d ed. 1992) (explaining that courts do not unanimously agree on the essential elements of the "scrupulously honor" test).

[70] *See Mosley*, 423 U.S. at 102-03; *see also* Stewart v. United States, 668 A.2d 857, 869 (D.C. 1995) (Farrell, J. concurring) (recognizing that "as applied uniformly by the courts of appeals, the *Mosley* standard permits further interaction between the police and the suspect and evaluates it case-by-case by applying multiple factors gleaned from the *Mosley* decision").

[71] 451 U.S. 477 (1981).

[72] *See id.* at 484-85.

[73] *See id.* at 484.

ingly, voluntarily, and intelligently waived the right to counsel.[74] As a corollary to that principle, the *Edwards* Court further held that an accused having expressed a desire to deal with the police only through counsel is not subject to further interrogation until an attorney is present or the accused himself initiates further communication with the police.[75] Thus, unlike the *Mosley* rule in the right-to-silence context, the *Edwards* rule in the right-to-counsel context clearly expresses the temporal effect of invoking the right — police questioning must cease *until an attorney is present or the accused initiates conversation.*

Subsequent cases have continued to build upon the *Mosley/Edwards* jurisprudential dichotomy. For example, while *Mosley* indicated that a significant factor in determining the appropriateness of resuming interrogation of a suspect who has invoked his right to silence is whether the subject of the subsequent interrogation is different from the first,[76] this analysis has been specifically rejected in the right-to-counsel context. In *Arizona v. Roberson*,[77] the Court held the *Edwards* rule, that an accused who has invoked his right to counsel is not subject to further questioning absent counsel's presence, to be applicable where police-initiated questioning occurs in the context of different charges in a separate investigation.[78] The Court reasoned that "the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation."[79] Accordingly, while in limited circumstances law enforcement authorities are permitted to approach a suspect who has invoked his right to silence and initiate further questioning in the absence of an attorney,

---

[74] *See id.* at 485, 482.

[75] *See id.* at 484-85; *see also* Miranda v. Arizona, 384 U.S. 436, 474 (1966) (stating that, once an accused indicates a desire to have an attorney, "the interrogation must cease until an attorney is present"). A suspect "initiates" conversation when he "evince[s] a willingness and a desire for a generalized discussion about the investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (Rehnquist, J., plurality opinion). The plurality view has since become the accepted standard for suspect "initiations." *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 546 (1992) ("While the Court split 4-4 in *Bradshaw* as to the proper test for initiation, the lower courts have consistently followed Justice Rehnquist's view.").

[76] *See Mosley*, 423 U.S. at 104-05; *see also* LAFAVE & ISRAEL, *supra* note 69, at 344 (stating that some courts have found this factor "essential . . . to a finding that defendant's rights were 'scrupulously honored,' and there is much to be said for this position").

[77] 486 U.S. 675 (1988).

[78] *See id.* at 682-83.

[79] *Id.* at 683.

"additional safeguards are necessary when the accused asks for counsel."[80] Interestingly, these "additional safeguards" appear to be precisely what lead the Court to its holding in *Davis*.[81]

The *Davis* majority seemed particularly concerned that requiring the cessation of questioning immediately upon an ambiguous or equivocal reference to counsel would unjustifiably "extend *Edwards*."[82] Absent that concern, there is little to suggest that the same high standard for invocations should apply in the right-to-silence context where procedural obstacles to custodial interrogation are significantly less, and thus requiring police to yield in response to ambiguity or equivocation is less likely to impede legitimate investigations.[83] Ultimately, in light of the significant differences between right to counsel and right-to-silence jurisprudence, the federal interest in maintaining the clarity essential to guide effectively law enforcement, while usually a significant concern,[84] cannot realistically weigh against formulating an invocation rule unique to the right to remain silent.[85]

---

[80] *Edwards*, 451 U.S. at 484. As the discussion accompanying *infra* notes 120-24 indicates, the "additional safeguards" triggered by a request for counsel are a function of the presumption raised by a suspect's request that he needs legal advice, rather than a conclusion that the right to counsel should be more stringently protected than the right to silence.

[81] *See infra* Part II.B.1.

[82] *See* Davis v. United States, 512 U.S. 452, 459, 461 (1994).

[83] Contrary to this argument, some courts have reasoned that *Davis* should be applied in the right-to-silence context because, since the right to counsel is accorded greater procedural protection than the right to silence, and *Davis*'s "clear invocation" rule applies to the right to counsel "by even greater logic," no more lenient standard should apply to the right to silence. *See, e.g.*, Evans v. Demosthenes, 902 F. Supp. 1253, 1259 (D. Nev. 1995), *aff'd*, 98 F.3d 1174 (9th Cir. 1996); State v. Williams, 535 N.W.2d 277, 284-85 (Minn. 1995). Despite the initial plausibility of this argument, because the procedural rules designed to effectuate and protect the Fifth Amendment privilege against self-incrimination must be analyzed with reference to the legal purposes sought to be achieved, rather than through syllogistic exercises, the applicability of *Davis*'s holding to the right to silence is best determined in the context of the reasons that led the Court to its decision in *Davis* and the substantive and practical distinctions between the two rights. *See infra* Parts II.B and III.

[84] The Supreme Court has repeatedly stated the importance of maintaining clarity in the law of custodial interrogation "in order . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow." Miranda v. Arizona, 384 U.S. 436, 441-42 (1966); *see also* Arizona v. Roberson, 486 U.S. 675, 680 (1988) (extolling the virtues of clarity in this area of law); Berkemer v. McCarty, 468 U.S. 420, 430 (1984) (noting that "[o]ne of the principal advantages" of *Miranda* is its clarity and ease of application);.

[85] A further difficulty with rotely extending *Davis* beyond the factual context in which it was decided is found in the constitutional and prudential considerations behind the "standing" rules implicitly found in the "case or controversy" requirement applicable to Article III courts. *See* U.S. CONST. art. III, § 2, cl. 1; Lujan v. De-

Yet, even while the need to promote clarity in the law of confessions does not *require* adherence to *Davis* in the right-to-silence context, whether the opinion's rationale nonetheless demonstrates the propriety of extending it to this area as well requires analysis of the reasons that led the Court to its holding.

B. The Davis *Rationale and the Right to Remain Silent*

Davis held that in order to provide a "bright line" rule essential for effective law enforcement and to avoid transforming procedural safeguards into "wholly irrational obstacles" to police investigations, a suspect in custody and subject to police interrogation must invoke the right to counsel "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[86] The dual purposes of maintaining a bright line and avoiding irrational investigative obstacles seem equally applicable in the right-to-silence context, thus suggesting *Davis*'s applicability. These purposes must be considered in light of the context in which they were invoked.

1. "Irrational Obstacles"

Since *Davis* was clearly a right-to-counsel case, the procedural safeguards of *Edwards*, rather than *Mosley*, stood to be triggered by the Court's decision.[87] Recognizing this, the Court was clearly concerned with the potential investigative inefficiency of giving effect to ambiguous references to counsel.[88] The Court reasoned that in some instances a suspect may ambiguously refer to an attorney without ac-

---

fenders of Wildlife, 504 U.S. 555, 560 (1992) (recognizing that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). Standing requires that a potential plaintiff have suffered 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision. *See id.* A primary purpose of the standing requirement is to ensure that litigants have a sufficient interest in the putative case or controversy to motivate an aggressive and thorough prosecution of the case, which in turn will aid in sharpening the issues for the courts' full consideration of the case and the impact its decision will have. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 95 (2d ed. 1991). Since *Davis* was decided as a right-to-counsel case, and neither the briefs nor oral argument before the Court considered the impact of the arguments in the right-to-silence context, there is a real concern that extending *Davis* beyond the context in which it was decided will result in ill-considered precedent.

[86] *Davis*, 512 U.S. at 459. The Court indicated that whether the accused actually invoked counsel "is an objective inquiry." *Id.* at 458-59.

[87] *Compare* Edwards v. Arizona, 451 U.S. 477, 482-83 (1981) (discussing right-to-counsel procedural safeguards), *with* Michigan v. Mosley, 423 U.S. 96, 103-05 (1975) (discussing right-to-silence procedural safeguards).

[88] *See infra* notes 89-90 and accompanying text.

tually desiring a lawyer's presence.[89] Thus, a rule that required the immediate cessation of questioning upon an ambiguous reference to counsel would, in some instances, needlessly prevent officers from interrogating suspects in the absence of counsel, even when a suspect is willing to speak without an attorney.[90] Such a rule, "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," according to the Court.[91] The *Davis* Court's reasoning in this regard clearly reflects the effect of *Edwards's* procedural safeguards and, in light of the significant differences between *Edwards* and *Mosley*, indicates the appropriateness of confining *Davis*'s holding to the right-to-counsel context.

The perceived obstacle to police interrogations imposed by *Edwards* simply does not exist in the same degree under *Mosley* and the right-to-silence context. *Mosley* made clear that a suspect who invokes his right to silence in response to police questioning may again be subject to police-initiated interrogation so long as authorities "scrupulously honor" the suspect's choice.[92] Thus, even presuming that some suspects may ambiguously express reluctance to speak with the police when they do not actually desire to invoke their right to silence, a rule requiring the cessation of questioning immediately upon an ambiguous or equivocal reference to the right to remain silent would not irrationally prevent police interrogation. Under *Mosley* and settled right-to-silence jurisprudence, officers are entitled to reinitiate conversation with an accused who has invoked the right to silence.[93] Thus, unlike a case controlled by *Edwards*, giving effect to a suspect's ambiguous invocation of the right to remain silent would not raise an irrational barrier to police investigations because clarification may later be sought, consistent with the accused's right to silence. The *Davis* Court's concern with creating an irrational obstacle to police investigative activity is thus inapplicable in the right-to-silence context.

2. "Bright Lines"

Davis's second major concern — preserving *Edwards*'s bright line rule that once counsel is requested all interrogation must cease until an attorney is present — is likewise inapplicable in the right-to-silence context for neither *Edwards's* bright line, nor any equally *per se*

---

[89] *See Edwards*, 451 U.S. at 460.
[90] *See id.*
[91] *Id.*
[92] *See Mosley*, 423 U.S. at 104.
[93] *See id.*

rule, apply in that context.[94] Moreover, the flexible "scrupulously honor" standard, which permits reinterrogation of suspects who have invoked their right to silence, would, in fact, complement application of the clarification approach rejected in *Davis* and reduce the pressure on law enforcement initially to judge, on pain of suppression, whether an accused invoked his right to silence.[95]

More fundamentally, the explanation for the *per se* aspects of the *Edwards* rule is premised upon counsel's "'unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.'"[96] By invoking the right to counsel, an accused "expresse[s] his own view that he is not competent to deal with the authorities without legal advice."[97] Yet, as *Mosley* made clear, an individual's decision to "cut off questioning" by invoking the right to remain silent raises no such presumption that he is unable to deal competently with the police without an attorney.[98] The *Davis* Court's concern with preserving the bright line of *Edwards*, therefore, will not justify extending *Davis*'s holding to the right-to-silence context. In sum, neither the language nor logic of the *Davis* opinion suggests the appropriateness of applying its holding in the right-to-silence context.[99] Courts faced with ambiguous invocations of the right to remain silent are therefore not constrained to follow *Davis*'s holding.

---

[94] The "scrupulously honor" standard is the antithesis of a bright line. To the extent that it is a largely fact-specific, multi-pronged standard, the precise elements of which lower federal courts continue to disagree on, it cannot be preserved as a "bright line" in the right-to-silence context whether *Davis* applies there or not.

[95] *See infra* Part IV.A.2.i.

[96] Arizona v. Roberson, 486 U.S. 675, 681-82 n.4 (1988) (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979)).

[97] Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1995) (White, J., concurring); *see Roberson*, 486 U.S. at 681-83.

[98] *See Mosley*, 423 U.S. at 110 n.2 (White, J., concurring); *Roberson*, 486 U.S. at 682-83.

[99] *See supra* notes 49, 86-98 and accompanying text. *But see* Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir. 1994) (stating that because the *Davis* concern "applies with equal force to the invocation of the right to remain silent, and because we have previously held that the same rule should apply in both contexts, we hold that the *Davis* rule applies to invocations of the right to remain silent"); United States v. Andrade, 925 F. Supp. 71, 79-80 (D. Mass. 1996) ("This court agrees . . . that the concern that lead to the [*Davis*] rule with respect to the invocation of the right to counsel is not less significant in the case of an invocation of the right to remain silent."). As the discussion in *supra* Part II.B and *infra* Part III demonstrates, these cases rest on an overly narrow reading of the *Davis* Court's reasoning and an inappropriately superficial analysis of the issue *sub judice*.

III. DEVELOPING AN ALTERNATIVE APPROACH TO AMBIGUOUS INVOCATIONS OF THE RIGHT TO SILENCE

Neither the federal interests in clarity and uniformity of law nor the dual rationales of *Davis* requires adherence to the *Davis* standard in the right-to-silence context.[100] Whether the rule of *Davis* is sufficiently incompatible with the right to silence to warrant departing from *Davis*, however, warrants separate consideration. Accordingly, this Part will consider the unique nature of the right to remain silent, distinguish it from the right to counsel, and suggest that the significant differences between the two rights justify departing from *Davis* and developing an approach that is responsive to the distinctive quality of the right to remain silent.

A. Substantive Considerations

Unlike most rights, the right to remain silent must affirmatively be invoked.[101] Frequently, as may be expected, a suspect's response following *Miranda* warnings will be sufficiently ambiguous such that police officers do not know whether the individual intends to invoke his rights or not.[102] While ambiguities may take the form of equivocal or seemingly contradictory words or actions,[103] some suspects will simply remain mute and refuse to speak or gesture at all in response to *Miranda* warnings and subsequent questioning.[104] Such conduct

---

[100] *See supra* Part II.A.

[101] *See supra* note 14 and accompanying text.

[102] *See* State v. Levya, 906 P.2d 894, 897 (Utah Ct. App. 1995) ("For a variety of reasons, including poor command of the English language, and fear or intimidation, defendants often respond in equivocal or ambiguous language when their *Miranda* rights are explained."), *aff'd in part, rev'd in part*, 951 P.2d 738 (Utah 1997). A suspect's ambiguous reference to the right to silence may occur either directly in response to *Miranda* warnings or later, following a waiver of *Miranda* rights. *See Levya*, 906 P.2d at 897-98 (recognizing a pre- and post-waiver distinction for purposes of ambiguous invocations of *Miranda* rights). *See, e.g.*, United States v. Ramirez, 79 F.3d 298, 303-04 (2d Cir. 1996) (holding that there is no invocation of the right to silence if, following waiver of *Miranda* rights, suspect ambiguously answered some questions and refused to answer others); United States v. Ramsey, 992 F.2d 301, 303 (11th Cir. 1993) (explaining that following *Miranda* warnings and officer's question of whether he wanted to make a statement, the suspect ambiguously responded by looking at the officer and looking away).

[103] *See, e.g.*, Ledbetter v. Edwards, 35 F.3d 1062, 1067, 1069 (6th Cir. 1994) (holding that no right to counsel is invoked if, in response to a third reading of *Miranda* warnings, the suspect stated that "it would be nice" to have an attorney present); Henry v. State, 462 S.E.2d 737, 742 (Ga. 1995) (noting that, in response to the question of whether he wanted an attorney, the suspect stated "I might need one. If I need one.").

[104] *See, e.g.*, United States v. Montana, 958 F.2d 516, 517 (2d Cir. 1992) (after receiving *Miranda* warnings, suspect refused to respond to routine booking questions

thus raises the question of whether the silence itself was intended to invoke the suspect's right to remain silent.[105] As one *pro se* criminal defendant argued in *Evans v. Demosthenes*,[106] "[my] refusal to answer any of the officer's questions was an obvious invocation of that right and any objective observer would have drawn that conclusion."[107]

This problem is compounded by the fact that, unlike the parallel right to counsel, suspects who remain mute in response to *Miranda* warnings and subsequent police questioning may simply believe that they are exercising the right to silence, about which they were just informed, without realizing their obligation to invoke affirmatively the right prior to exercising it.[108] For these individuals, in light of the significant body of case law holding such silence to be at best ambiguous,[109] application of *Davis* will more often than not deny them the ability to "cut off questioning" — the essence of the right to remain silent[110] — because their silence will not be "a clear assertion of

---

thereby invoking right to silence); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) (suspect remained silent throughout ten minutes of interrogation after receiving *Miranda* warnings).

[105] *See* State v. Ross, 552 N.W.2d 428, 432 (Wis. Ct. App. 1996) ("Indeed, a suspect could theoretically attempt to invoke his or her right to silence by remaining stone silent in the face of police questioning.").

[106] 902 F. Supp. 1253, 1257 (D. Nev. 1995), *aff'd*, 98 F.3d 1174 (9th Cir. 1996).

[107] *Demosthenes*, 902 F. Supp. at 1257 (quoting defendant/appellant's brief to the court of appeals which remanded the case to the district court for reconsideration in light of cases holding that silence in the face of ten minutes of interrogation was sufficient to invoke the right to remain silent); *see Ross*, 552 N.W.2d at 429 (noting that a suspect who remained silent following *Miranda* warnings argued that his silence was an invocation of the right to remain silent); *see also infra* note 135 and accompanying text (discussing pre-*Davis* cases holding silence in the face of interrogation was an invocation of the right to remain silent).

[108] This problem, unique to the right-to-silence context, does not arise in the right-to-counsel context where few, if any, suspects should expect that by remaining silent the police would understand their silence as an exercise of the right to counsel.

[109] *See, e.g.*, United States v. Ramsey, 992 F.2d 301, 305 (11th Cir. 1993) (holding that the defendant equivocally invoked right to silence when, in response to the officer's inquiry of whether the defendant wanted to make a statement, the defendant looked at officer and looked away); People v. Cohen, 226 A.D.2d 903, 904 (N.Y. App. Div. 1996) (holding that "[d]efendant's silence after responding to questions for 30 minutes was ambiguous conduct" that was insufficient to invoke the right to remain silent); *Ross*, 552 N.W.2d at 432 (applying the *Davis* standard and concluding that "a suspect's silence, standing alone, is insufficient to invoke unambiguously the right to remain silent."); People v. Cooper, 731 P.2d 781, 784 (Colo. Ct. App. 1986) (stating that "a defendant's silence, without more, is insufficient to require the police to discontinue questioning").

[110] *See* Michigan v. Mosley, 423 U.S. 96, 100-01 (1975) ("'Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome [his] free choice in producing a statement after the privilege has been once invoked.'") (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)); United

the right."[111] Extension of *Davis* to the right to silence will therefore result in effectively denying many suspects the reprieve from police interrogation to which they are entitled, while failing simultaneously to advance any legitimate governmental or law enforcement interest.[112] While confessions undoubtedly are essential to the continued effectiveness of law enforcement,[113] the government has no legitimate interest in maintaining a system of criminal justice that relies for its effectiveness on ignoring citizens' attempts to invoke their constitutional rights.[114] The unique nature of the right to silence in this regard justifies departure from *Davis* and a rule that is responsive to the distinctive concerns raised by ambiguity in this area.

In addition, the right to remain silent is on greater constitutional footing than the *Miranda* right to counsel and thus arguably warrants a more flexible rule regarding invocations.[115] Because the right to refuse to provide testimonial information when under compulsion to do so is the essence of the Fifth Amendment privilege,[116] invocations of the right to remain silent may more properly be governed by the usual presumption against waiver of constitutional rights[117] than the *Miranda* right to counsel, which is at least one layer of prophylaxis removed from the Fifth Amendment privilege.[118] In

---

States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995) (recognizing that "[a] person's 'right to cut off questioning' is central to the Fifth Amendment, and this right must be 'scrupulously honored.'") (quoting *Mosley*, 423 U.S. at 103).

[111] Davis v. United States, 512 U.S. 452, 460 (1994).

[112] *See infra* note 114 and accompanying text.

[113] *See* Moran v. Burbine, 475 U.S. 412, 427 (1986) (recognizing "society's legitimate and substantial interest in securing admissions of guilt"); United States v. Washington, 431 U.S. 181, 187 (1977) (recognizing that "admissions of guilt by wrongdoers, if not coerced, are inherently desirable").

[114] *See* Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.").

[115] *Cf.* State v. Strayhand, 911 P.2d 577, 592 (Ariz. Ct. App. 1995) (stating that *Davis* arguably "undercuts" Arizona's rule of clarification in the right-to-silence context "although *Davis* did not deal with the Fifth Amendment guarantee against self-incrimination").

[116] *See* Schmerber v. California, 384 U.S. 757, 761 (1966) (stating that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."); Pennsylvania v. Muniz, 496 U.S. 582, 590-600 (1990) (recognizing and applying distinction between compelling production of testimonial and physical evidence for purposes of privilege against self-incrimination).

[117] *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979); Brewer v. Williams, 430 U.S. 387, 404 (1977) (stating that "courts indulge in every reasonable presumption against waiver" of constitutional rights); *see also* Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[118] The right to counsel recognized in *Miranda* has the limited purpose of protecting the Fifth Amendment privilege against self-incrimination during custodial

fact, this substantive distinction between the rights to counsel and silence would explain the apparent disharmony, recognized by some commentators, between the Court's decision in *Davis* and the long-standing presumption against finding a waiver.[119]

While it may be argued that recognizing a more flexible standard for invoking the right to silence than the right to counsel would be inconsistent with the Court's practice of erecting more stringent procedural protections around the right to counsel,[120] the argument fails to recognize that procedural safeguards designed to protect the privilege against self-incrimination are justified by reference to their prophylactic purpose.[121] The reason why a suspect who invokes the right to counsel is not subject to police questioning absent counsel's presence is that the request raises an irrebuttable presumption of the suspect's need for legal advice.[122] No such presumption is raised by the invocation of the right to remain silent.[123] The prophylactic proscription against reinterrogation in a right-to-counsel case is thus best explained by the need to ensure that a suspect's right to rely on counsel's "unique ability to protect . . . Fifth Amendment rights" is not jeopardized,[124] rather than an unarticulated *per se* rule that right-to-counsel standards must always be more stringent than right-to-silence standards.

---

interrogation. *See Miranda*, 384 U.S. at 469-70; Faulkner, *supra* note 19, at 288-89. The right to remain silent, on the other hand, is the core value of the Fifth Amendment privilege. *See Miranda*, 384 U.S. at 469-70. This is not to argue, however, that the right to remain silent, as interpreted in *Miranda*, does not itself have prophylactic characteristics attributable more to *Miranda* than the Fifth Amendment. For example, by presuming the existence of government "compulsion" necessary to trigger the Fifth Amendment privilege, *Miranda* applies the right to remain silent broader than the Fifth Amendment alone would warrant. *See* Oregon v. Elstad, 470 U.S 298, 304-06 (1985) (explaining that the *Miranda* exclusionary rule reaches statements that the Fifth Amendment itself would not because compulsion is presumed under *Miranda*). This, however does not alter the conclusion that between the two rights recognized in *Miranda*, the right to silence is considerably more constitutionally supportable by the Fifth Amendment than the right to counsel.

[119] *See generally* Jonathan B. Bruno, Comment, Davis v. United States: *Leaving Less Articulate Suspects to Fend for Themselves in the Face of Custodial Interrogation*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29 (1996).

[120] *See, e.g.*, cases cited *supra* note 83.

[121] *See* Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

[122] *See* Arizona v. Roberson, 486 U.S. 675, 683 (1988).

[123] *See id.*

[124] Fare v. Michael C., 442 U.S. 707, 719 (1979); *see Roberson*, 486 U.S. at 682-83 n.4.

B. Practical Considerations

In addition to these substantive concerns, considered from the perspective of the suspect, a significant practical concern, from the view of law enforcement, further highlights the need for distinctive rules in these two areas of law. A suspect's invocation of *Miranda* rights imposes significant obligations on police officers involved in the investigation.[125] The scope of the duty thus created is dependent upon the right which is invoked.[126] If an individual invokes the right to silence, the police must "scrupulously honor" that decision and immediately cut off questioning.[127] This duty is a passive obligation in that it requires the *cessation*, if only temporary, of an interrogation.[128] Compliance is easily accomplished; and because reinterrogation is still permissible, does not necessarily jeopardize the success of an investigation.

On the other hand, if an individual invokes the right to counsel, a significantly more affirmative obligation is imposed upon the police. Not only must all questioning immediately cease, but the suspect must also be provided with an attorney.[129] This duty to provide counsel is not nearly as easily accomplished and has a higher potential to stymie an investigation.[130] The greater procedural and affirmative obligations imposed upon police when an accused asks for counsel thus translate into a corresponding greater need on the part of

---

[125] *See supra* notes 9-13 and accompanying text.

[126] *See supra* notes 9-13 and accompanying text.

[127] *See supra* notes 9-13 and accompanying text.

[128] The passage of time approved in *Mosley* was approximately two hours, which the Court characterized as a "significant period." *See* Michigan v. Mosley, 423 U.S. 96, 104, 106 (1975). On the other hand, two minutes has been held insufficient. *See* Charles v. Smith, 894 F.2d 718, 726 (5th Cir. 1990).

[129] *See supra* Part II.A.2. While the *Miranda* court stated that "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time," there is no question that the police must secure counsel for the individual who invokes his right. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

[130] *See* Watts v. Indiana, 338 U.S. 49, 59 (1949), in which Justice Jackson stated:

> To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client — guilty or innocent — and that in such capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.

Id. (Jackson, J., concurring).

the police to know whether a suspect has invoked the right. The *Davis* standard is arguably suited to that purpose.[131] Yet, in the right-to-silence context, no such heightened need to ensure the suspect's wishes is present. If faced with an ambiguous indication of a desire to remain silent, and thus the uncertainty of whether a duty has been triggered, police may simply temporarily refrain from further questioning and later return to resume the interrogation consistent with *Mosley*. By so doing, the police will have insulated themselves from the specter of suppression by discharging their duty, in the event one was created, while not permanently abandoning an interrogation, in the event one was not.[132] In sum, different invocation standards in the right-to-silence and right-to-counsel contexts can be justified by reference to the varying duties that each right imposes upon the police.[133]

---

[131] By relating the burden imposed upon law enforcement to the clarity with which a suspect must invoke his right, this argument implicitly tracks the analytic approach taken by the *Davis* Court. *See* Davis v. United States, 512 U.S. 452, 459-61 (1994) (reasoning that in the absence of a "clear" invocation of right to counsel, police may be hampered, through the threat of suppression and needlessly lost interrogation opportunities, from gathering information regarding crime under investigation).

[132] Moreover, as the discussion in Part IV demonstrates, the proposed definition of a "clear invocation," in the presence of which all questioning must immediately cease, combined with a clarification mandate, should largely eliminate the uncertainty of whether a duty has been triggered by a suspect's response.

[133] *See supra* note 127 and accompanying text. An additional practical distinction relates to the methods by which suspects will foreseeably attempt to invoke the rights to counsel and silence. Ordinarily the right to counsel will only be invoked by a verbal or written assertion. *See* State v. Williams, 535 N.W.2d 277, 283 (Minn. 1995). Attempts to invoke the right to silence, on the other hand, may be made by words (oral or written), actions, or inaction. *See, e.g.*, United States v. Andrade, 925 F. Supp. 71, 80 (D. Mass. 1996) (describing the defendant as a suspect who remained silent and in response to further questioning gave the police "a dismissive gesture"); United States v. Boyce, 594 F.2d 1246, 1250 (9th Cir. 1979) (recognizing that "[u]nder some circumstances, declining to sign a *Miranda* waiver form will be an assertion of the right to silence . . . ."). Recognition of this fact puts the police on notice that even nonverbal conduct should be scrutinized to discern whether a suspect's behavior could reasonably be interpreted as indicative of an intent to invoke the right to remain silent. Because police officers are trained to observe suspects' conduct and draw inferences therefrom, this should not impose an undue burden on law enforcement. *See* Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 586 (1997) (arguing in the Fourth Amendment context that a rule that "demand[s] no more of law enforcement officers than what they are capable of providing" is not burdensome to the police). The variety of methods with which the right to silence may be invoked, the predictability of many thereof, and the realization that careful scrutiny of suspects' behavior lies at the heart of a police officer's skill and training all counsel in favor of a less stringent standard for invocations of the right to silence than *Davis* provides.

IV. THE PROPOSED APPROACH

The prior discussion has considered the separate though related questions of whether either the jurisprudential or substantive and practical differences between the rights to counsel and silence advise courts to follow *Davis* in the right to remain silent context.[134] Having resolved each inquiry against extending *Davis*, this Part will propose an alternative approach to ambiguous invocations of the right to remain silent that is responsive both to the unique nature of the right and the traditional law enforcement reliance on confessions in order effectively to interdict crime.

A. Invoking the Right to Silence

Under the proposed approach, a suspect would be held to have invoked the right to remain silent by any words or actions,[135] including a refusal to answer questions, that could reasonably be interpreted by the police as intended to invoke the right to silence.[136] If a suspect's behavior meets this threshold, then an invocation of the right to silence will be presumed as a matter of law, the general interrogation must immediately cease, and the scope and immediacy of any subsequent questioning will be determined by reference to whether the individual's invocation was "clear" or "ambiguous." This standard hews closely, though not identically, to the Court's only two prior decisions to have specifically addressed the degree of clarity

---

[134] *See supra* Parts II and III.

[135] *See* Kappos v. Hanks, 54 F.3d 365, 369 (7th Cir. 1995) (stating that "[a] voiced refusal to cooperate or acts indicating such a refusal are the equivalent of invoking the right of silence"); *Boyce*, 594 F.2d at 1250 (noting that "[u]nder some circumstances, declining to sign a *Miranda* waiver form will be an assertion of the right to silence . . . ."); Brooks v. State, 229 A.2d 833, 836 (Del. 1967) (recognizing that "a desire to terminate questioning may be shown in some manner other than express language"); *see also* Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

[136] This definition builds upon the Court's holdings in the companion cases of *Quinn v. United States*, 349 U.S. 155 (1955) and *Emspak v. United States*, 349 U.S. 190 (1955). *See infra* text accompanying notes 138-45. In the custodial interrogation context, see *Oregon v. Bradshaw*, 462 U.S. 1039, 1040 (1983) (plurality opinion), which addressed the issue whether a suspect's ambiguous question "[w]ell, what is going to happen to me now?" was sufficient to initiate further discussion with the police within the meaning of *Edwards*. *See id.* Concluding that the question was ambiguous, but "could reasonably have been interpreted by the officer" as reinitiating a discussion of the subject of the interrogation, the Court held the statement sufficient to permit a resumption of questioning. *Id.* at 1045-46.

with which the privilege against self-incrimination must be invoked — *Quinn v. United States*[137] and *Emspak v. United States.*[138]

In *Quinn* and *Emspak* the Court addressed the issue of whether a witness's statement in response to questions from a subcommittee of the Committee on Un-American Activities of the House of Representatives was sufficiently clear to invoke the privilege against self-incrimination.[139] The Court first reaffirmed the rule that "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination." The court then held that in order to invoke the privilege, "[a]ll that is necessary is an objection stated in language that a committee *may reasonably be expected to understand as an attempt to invoke the privilege.*"[140] The proposed standard is consistent with this broad approach.

1. Clarity and Ambiguity

An invocation is "clear" if it leaves "no reasonable doubt" of the suspect's intent to invoke the right to remain silent.[141] If an individual has clearly invoked the right to silence, he has expressed his desire to cut off questioning and further interrogation may only be resumed after the suspect's decision has been "scrupulously

---

[137] 349 U.S. 155 (1955).

[138] 349 U.S. 190 (1955). Neither the courts nor commentators seem to have addressed the relevance of these cases to the issue sub judice.

[139] *See Quinn*, 349 U.S. at 162; *Emspak*, 349 U.S. at 191-93. In *Quinn*, the witness refused to answer questions designed to elicit his affiliation, if any, with the Communist Party, based "on 'the first and fifth amendments' as well as 'the first amendment to the United States Constitution, supplemented by the fifth amendment.'" *See Quinn*, 349 U.S. at 157-58. In *Emspak*, the witness refused to answer similarly designed questions based on "primarily the first amendment, supplemented by the fifth." *See Emspak*, 349 U.S. at 193-94.

[140] *Emspak*, 349 U.S. at 194 (emphasis added); *see Quinn*, 349 U.S. at 162-63. The proposed approach differs from this standard in that the proposed approach does not require an individual necessarily to use "language" to invoke the right to remain silent as the *Quinn/Emspak* standard apparently does. *See supra* text accompanying notes 135-36 (including "a refusal to answer questions" among the permissible methods of invoking the right to silence).

[141] *Cf. Quinn*, 349 U.S. at 164 ("When a witness declines to answer a question because of constitutional objections and the language used is not free from doubt, the way is always open . . . to inquire into the nature of the claim before making a ruling."); State v. Farley, 452 S.E.2d 50, 59 (W. Va. 1994) ("We believe that under *Davis* insubstantial and trivial doubt, reasonably caused by the defendant's ambiguous statements as to whether he wants the interrogation to end, should be resolved in favor of the police . . . ."). For a different formulation of a "clear" invocation, see Florida v. Owen, 696 So. 2d 715, 722 (Fla. 1997) (Shaw, J., concurring) ("In my view, a suspect 'clearly' invokes the right to cut off questioning when a reasonable person would conclude that the suspect has evinced a desire to stop the interview.").

honored."[142] In determining whether a "clear" invocation has been made, courts should look not only to the words used (if any), but as well to the circumstances leading to the suspect's response and the context in which it is given.[143] In making this inquiry, an accused's post-invocation statements will be inadmissible to "cast retrospective doubt" on the clarity of the initial invocation.[144] In the absence of such a rule, the authorities may be motivated to ignore an initial response with the purpose of manufacturing an ambiguity through further illicit colloquy.

On the other hand, an invocation is ambiguous if it meets the threshold definition of "invocation," but nonetheless leaves the police "reasonably uncertain" whether the suspect intended to invoke the right to silence.[145] If an individual makes an ambiguous invoca-

---

[142] *See* Michigan v. Mosley, 423 U.S. 96, 104 (1975); *supra* Part II.A.1.

[143] *See* Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) (indicating that in determining whether a request for counsel is ambiguous, both the request and the circumstances leading to the request should be analyzed); United States v. Johnson, 56 F.3d 947, 955 (8th Cir. 1995) ("We consider the defendant's statements as a whole to determine whether they indicate an unequivocal decision to invoke the right to remain silent."); *see also Owen*, 696 So. 2d at 722 (stating that "[a]ll the circumstances surrounding the statement — including the suspect's schooling, command of English, and ethnic background — should be considered" in determining whether a response is a clear invocation of the right to silence). Because of the significant potential for suspects to confuse the need to invoke the right to silence with the actual exercise thereof, see *supra* notes 105-08 and accompanying text, a persistent refusal to speak in the face of interrogation under circumstances indicating that the accused is aware of the questions being put to him, would be a significant factor indicating that the individual has "clearly" invoked his right to silence. *Cf.* United States v. Montana, 958 F.2d 516, 518 (2d Cir. 1992) ("After receiving a *Miranda* warning, a defendant's silence in the face of repeated questioning has been held sufficient to invoke the Fifth Amendment privilege . . . ."). This aspect of the proposed approach should not significantly diminish the bright line character of the "clear" invocation definition in light of experience that reveals that the police may typically view such persistent silence as an invocation of the privilege. *See id.* The Federal Rules of Evidence also recognize that under certain circumstances, nonverbal conduct can be equivalent to a "statement" when intended by a declarant to be assertive. *See* FED. R. EVID. 801(a) (defining "statement" to include "nonverbal conduct of a person, if it is intended by the person as an assertion.").

[144] *See Smith*, 469 U.S. at 100 (holding in the right-to-counsel context that "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request [for counsel]"); Campaneria v. Reid, 891 F.2d 1014, 1022 (2d Cir. 1989) (stating that "statements made in response to questions after a suspect has invoked his right to remain silent cannot be used to raise doubts about his initial invocation").

[145] The complete proposed definition of an "ambiguous invocation" of the right to remain silent, therefore is, "any words or actions, including a refusal to answer questions, that could reasonably be interpreted by the police as intended to invoke the right to silence, but which nonetheless leave the police reasonably uncertain whether the suspect intended to invoke the right to silence." *See supra* text accompanying notes 135-36. In the right-to-counsel context, *Davis* failed to define an

tion of the right to silence, the general interrogation must immediately cease and the scope of further questioning must be strictly limited to clarifying the suspect's response.[146] If during the clarification process, the individual "clearly" invokes his right to silence, all questioning must immediately cease and the right must be "scrupulously honored." Likewise, if clarifying questions reveal that the ambiguity

---

"ambiguous" invocation because of its holding that, for constitutional purposes, there is either a "clear" invocation or no invocation. *See* Davis v. United States, 512 U.S. 452, 458-61 (1994). Because the proposed approach attaches constitutional (or at least enforceable prophylactic) significance to an "ambiguous" request, definition is necessary. The proposed definition was developed in light of various pre-*Davis* circuit court formulations developed in the right-to-counsel context. *See, e.g.*, United States v. March, 999 F.2d 456, 461 (10th Cir. 1993) (noting that an ambiguous invocation is made "whenever a suspect makes a statement or asks a question that appears to contemplate invocation of his right to counsel."), *cert. denied*, 510 U.S. 983 (1993); Towne v. Dugger, 899 F.2d 1104, 1109 (11th Cir. 1990) (stating that an "equivocal request" for counsel is "an ambiguous statement, either in the form of an assertion or a question, communicating a possible desire to exercise [the] right to have an attorney present during questioning"), *cert. denied*, 498 U.S. 991 (1990); United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988) ("Equivocal statement[s] that arguably can be construed as . . . request[s] for counsel" are ambiguous invocations); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979) (finding an ambiguous invocation of right to counsel where the suspect "expresses both a desire for counsel and a desire to continue the interview without counsel"), *cert. denied*, 444 U.S. 981 (1979); *see also* State v. Levya, 906 P.2d 894, 899 (Utah Ct. App. 1995) (stating that an "arguably equivocal" statement is sufficient to invoke the right to silence and that "arguably equivocal 'indicates that defendant need only show that it is open to argument that one of the meanings of [the defendant's] statement was desire to terminate questioning'") (quoting State v. Gutierrez, 864 P.2d 894, 902 (Utah Ct. App. 1993)) (brackets in original).

[146] Like the definition of "invocation," *see supra* text accompanying notes 135-36, 145, this element of the proposed approach also finds support in the Court's decisions in *Quinn* and *Emspak*, in which the Court stated that "a [congressional] committee is not obliged to either accept or reject an ambiguous constitutional claim the very moment it is first presented. The way is always open for the committee to inquire into the nature of the claim before making a ruling." Emspak v. United States, 349 U.S. 190, 195 (1955). In the custodial interrogation context, see *State v. Strayhand*, 911 P.2d 577, 592 (Ariz. Ct. App. 1995) (rejecting *Davis* in the right-to-silence context and reaffirming the rule, under state law, that "'[e]ven if the defendant's assertion is susceptible to more than one interpretation, the limit of permissible continuing interrogation immediately after the assertion would be for the sole purpose of ascertaining whether the defendant intended to invoke his right to silence, or to waive this right.'") (quoting State v. Finehout, 665 P.2d 570, 573 (Ariz. 1983)). In the right-to-counsel context, prior to *Davis*, the clarification approach to ambiguous invocations had been adopted by a significant majority of federal courts. *See, e.g.*, Porter v. United States, 776 F.2d 370, 370 (1st Cir. 1985); United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988); United States v. Riggs, 537 U.S. 1219, 1222 (4th Cir. 1976); Thompson v. Wainright, 601 F.2d 768, 771 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir. 1979); United States v. Neilsen, 392 F.2d 849, 853 (7th Cir. 1968); United States v. Fouche, 776 F.2d 1398, 1404-05 (9th Cir. 1985); United States v. March, 999 F.2d 456, 461 (10th Cir. 1993); Towne v. Dugger, 899 F.2d 1104, 1107 (11th Cir. 1990).

was not intended to invoke the right, then a general interrogation may resume. In any event, because the individual has presumptively invoked the right to silence, statements obtained during the clarification process will be inadmissible as substantive evidence of guilt.[147] The proposed approach has a number of distinct advantages over the *Davis* rule and is likely to be preferred by both law enforcement officers and suspects who have been thrust into the unpleasant thicket of custodial interrogation.[148]

2. Arguments in Favor

i. Reasonable Accommodation

Under the proposed approach, if a suspect makes an ambiguous invocation of the right to silence, the scope of further questioning is immediately narrowed to clarifying the suspect's intent.[149] With proper safeguards,[150] this rule occupies a reasonable middle ground between allowing the slightest hesitation by a custodial suspect to inhibit an investigation and denying to all but the most articulate the right to cut off questioning.[151]

The inherently compelling pressures of custodial interrogation are by now well documented.[152] Both the interrogation atmosphere

---

[147] *See Gotay*, 844 F.2d at 975. Pre-*Davis* courts applying a clarification approach to ambiguous requests for counsel uniformly held that police may not use statements obtained after an equivocal request and before the ambiguity has been clarified. *See, e.g.*, Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979); United States v. Pena, 897 F.2d 1075, 1081 (11th Cir. 1990); Towne v. Dugger, 899 F.2d 1104, 1107-08 (11th Cir. 1990), *cert. denied*, 498 U.S. 991 (1990). The clarification process should not, however, be held to create a safe haven for suspects who "volunteer" completely nonresponsive statements, whether exculpatory or inculpatory, after ambiguously invoking the right to silence and prior to clarifying the ambiguity.

[148] *See* Brief of Amici Curiae of Americans for Effective Law Enforcement, Inc., Joined by the International Association of Chiefs of Police, Inc., The National District Attorneys Association, Inc., and The National Sheriffs' Association In Support of the Respondent at 5, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (urging the Court to adopt a clarification rule in the context of ambiguous comments regarding counsel as a "common sense" method of "accomodat[ing] the rights of the subject, while at the same time preserv[ing] the interests of law enforcement and of the public welfare."); *see also infra* notes 176-82 and accompanying text (explaining likely benefits to accused of a broad definition of invocation and rule requiring clarification).

[149] *See supra* Part IV.A.1.

[150] For a discussion of the potential for abuse in the clarification process and proposed guidelines designed to prevent it, see *infra* Part IV.B.

[151] *See Gotay*, 844 F.2d at 975 ("Suspects should not be forced, on pain of losing a constitutional right, to select their words with lawyer-like precision . . . .").

[152] *See supra* note 4.

and the questioning itself are designed to "trade[] on the weakness of individuals."[153] It is not only the "subnormal or woefully ignorant" who fall prey to coercive police tactics.[154] The union of these factors demonstrates that ambiguity and equivocation in response to police questioning is typically not only foreseeable, but predictable. In light of this reality, the proposed approach gives effect to any response that the police could reasonably interpret as intending to invoke the right to silence. This standard preserves the rights of custodial suspects who intend to invoke their right but are unable to do so with the degree of clarity preferred by those in charge of the investigation.

From the law enforcement perspective, however, the definition of "invocation" might seem overbroad. By reaching any response which "could reasonably be interpreted as an invocation," the proposed standard will surely affect interrogations where suspects do not actually intend to cut off questioning. The rule, it may be argued, would thus create the precise investigative inefficiency which concerned the *Davis* Court in the right-to-counsel context, and is therefore subject to the same criticism — that it "unduly hamper[s] the gathering of information."[155] While similar reasoning has apparently convinced some courts to adopt the *Davis* rule in the right-to-silence context,[156] the argument is ultimately meritless because it ignores both the flexibility of the "scrupulously honor" approach, not found

---

[153] Miranda v. Arizona, 384 U.S. 436, 468 (1966).

[154] Davis v. United States, 512 U.S. 452, 469 (1994) (Souter, J., concurring). Justice Souter stated that "[a] substantial percentage of [criminal suspect's] lack anything like a confident command of the English language, . . . many are 'woefully ignorant,' . . . and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them." *Id.* (quoting *Miranda*, 384 U.S. at 468) (citations omitted). For many individuals subjected to custodial interrogation, the ability to invoke assertively their rights will further be hampered by an uncertainty of what the *Miranda* warnings mean. According to one study of suspects' understanding of the *Miranda* warnings:

> The warning of the suspect's right to silence was equally confounding. Several believed it meant they had a right to talk; some believed they had been told they would not be allowed to talk. One suspect said it meant he "should have the right to say something so they can use it in evidence in court," and another said it meant that "if I . . . like try to bribe them, they would use it against me in court."

LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 180 (1983) (ellipsis in original).

[155] *Davis*, 512 U.S. at 461.

[156] *See* United States v. Andrade, 925 F. Supp. 71, 79-80 (D. Mass. 1996) (stating that the *Davis* Court's concerns apply equally in the right-to-silence context); Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir. 1994) (noting that the concerns of the *Davis* Court "appl[y] with equal force to the invocation of the right to remain silent").

in the *Edwards* bright line, and the obvious benefits to be gained by permitting clarification.

The proposed standard will unquestionably affect some interrogations where the suspect, by his ambiguous response, did not actually intend to cut off questioning. The critical distinction, however, between a right-to-counsel case governed by *Edwards* and a right-to-silence case governed by *Mosley*, is the "effect" of such overbreadth on the ability of police to gather information. Under *Edwards*, "the interrogation must cease until an attorney is present," while under *Mosley*, questioning may be resumed if the right has been "scrupulously honored." Because in a right-to-silence case "invocation" does not indefinitely suspend all interrogation, the relation between the definition of "invocation" and the potential for investigative inefficiency is significantly more attenuated. A suspect who is unwittingly treated as having invoked his right to silence under the proposed definition, yet who did not intend to cut off questioning, may again be subject to interrogation once the right has been "scrupulously honored."[157] Thus, any perceived inefficiency of the proposed definition is illusory because the police will not indefinitely be prevented from interrogating such a suspect.

Moreover, whatever inefficiency would flow from presuming ambiguities to be invocations would clearly be offset by the subsequent clarification permitted under the proposed approach. By permitting narrow questions, strictly limited to clarifying the suspect's ambiguity, clarification can both reveal and remedy any "harmless error" effected through incorrectly attributing an invocation to a suspect whose ambiguous response was not actually intended to invoke his right. The proposed approach will thus extend the "right to cut off questioning" to even the woefully inarticulate who desire it, while providing the clarification mechanism to identify more particularly those who do not. By preserving individual rights without compromising law enforcement interests, clarification is "the intuitively sensible course."[158]

---

[157] Besides, as was noted in the right-to-counsel context, *see supra* note 43, the concern that a suspect who actually desires to speak with the police will be prevented from doing so because his ambiguity is presumptively treated as an invocation of the right to silence is specious at best. The law is well settled that an individual, whether in custody or not, may volunteer information to the police if she freely chooses to do so. *See Miranda*, 384 U.S. at 478 (noting that suspects in custody may volunteer statements to the police).

[158] *Davis*, 512 U.S. at 473 (Souter, J., concurring). While clarification in the right-to-counsel context could likewise eliminate the inefficiency of giving effect to ambiguous counsel references where the suspect did not actually desire an attorney's presence, the *Davis* Court rejected the suggestion in favor of preserving the *Edwards*

ii. Bright Lines

A significant feature of the proposed approach is its clearly defined standards for guiding police officers in ascertaining their obligations consistent with the Fifth Amendment privilege. Under the proposed definition of invocation, only if a suspect's response could not reasonably be interpreted as indicating an intent to cut off questioning will the police be justified in ignoring the response and proceeding with a general interrogation.[159] If the officer has "any reasonable doubt," he should clarify the suspect's intent. At this point, the officer is entitled to dispel his reasonable doubt through questions narrowly confined to clarifying the individual's response.[160] Only when the individual has "clearly" expressed a desire to cut off questioning must the clarifying questions cease.[161] Since a "clear" invocation is defined as one leaving "no reasonable doubt" of the suspect's intent, this standard provides a bright guiding line for police during the interrogation process. This combination of bright lines and flexibility "relieves the police officer of the need to speculate about the suspect's wishes"[162] and thus responds to one of the chief concerns of the *Davis* Court — the loss of evidence through suppression where officers have "guessed" wrong.[163] Rather than invite the "difficult judgment calls" which, if subsequently overruled by a court, would require suppression of any statements directly obtained as a result,[164] the proposed approach sensibly permits the police to ascertain the suspect's wishes and thereby dispel whatever uncertainty exists. As one commentator has recognized, such "clarification efforts

---

bright line. *See id.* at 459-62. The concern that lead the Court to reject a clarification rule in *Davis* is thus not present in the right-to-silence context, where the *Edwards* bright line is inapplicable.

[159] *See supra* notes 135-36 and accompanying text.

[160] For a discussion of proposed guidelines to aid the implementation of the clarification process, see *infra* Part IV.B.

[161] *See supra* notes 141-44 and accompanying text.

[162] Brief for the United States at 24, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949).

[163] *See Davis*, 512 U.S. at 461 (articulating concern to avoid forcing police officers to "make difficult judgment calls about whether the suspect in fact wants a lawyer . . . with the threat of suppression if they guess wrong").

[164] *See id.* Statements obtained in violation of *Miranda* may not be used as substantive evidence against the defendant at trial. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (stating the suppression rule applied both to the right to counsel and to the right to silence); *see also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (stating the suppression rule in the context of the right to counsel); Michigan v. Mosley, 423 U.S. 96, 104 (1975) (stating rule of suppression in context of right to remain silent).

will more often than not settle matters — and settle them correctly."[165]

Yet, even where matters are not so easily settled, clarification may still reduce the chance of suppression by resulting in a more fully developed record of the station house exchange between the police and the suspect.[166] A more complete record of the essential issues (e.g., what statements were made, and what were the circumstances in which they were made?) will reduce the number of confessions lost through suppression in two ways. First, a well-developed record may dissuade some defendants from pursuing a suppression motion.[167] Second, where such motions are made, the record will facilitate the government's burden of proof on the critical issues of invocation and waiver.[168]

While the proposed clarification approach seems intuitively reasonable,[169] it has also been associated with several perceived dangers. Most particularly, the risk that further questioning following an ambiguous invocation will "shade subtly into illicit[] badgering"[170] warrants analysis of the potential perils of clarification and whether appropriate guidelines may be established to dispel the potential risks.

B. Arguments Against Clarification and Proposed Guidelines

Despite the immediate appeal of the proposed approach in the right to remain silent context, two key arguments have been leveled against clarification. The first is that those suspects whose ambiguity was actually intended to invoke the right to silence will view further police questioning as coercive.[171] A second related argument is that

---

[165] James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1016 n.158 (1986).

[166] *Cf.* United States v. Gotay, 844 F.2d 971, 975 (2d Cir. 1988) (recognizing that "[a]llowing custodial authorities to clarify ambiguous requests [for counsel] will help them, as well as reviewing courts, to determine on which side of the [*Edwards*] bright line the request falls").

[167] Every motion filed in a federal court must be signed by an attorney of record who thereby certifies "that to the best of the [signer's] knowledge, information, and belief formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" FED. R. CIV. P. 11. An attorney who violates Rule 11 may be required to pay the other parties' reasonable costs and attorney's fees. *See id.*

[168] *See supra* note 13 and accompanying text.

[169] For a discussion of the benefits of the clarification approach proposed by this Article, see *supra* Part IV.A.2.

[170] Davis v. United States, 512 U.S. 452, 475 (1994) (Souter, J., concurring).

[171] *See* Petitioner's Brief, at 29-30, *Davis* (No. 92-1949); Reply Brief at 6, Davis v.

police will manipulate the clarification opportunity toward subtly influencing a suspect to waive his rights and speak where he might not otherwise do so freely.[172] Each view is problematic. While the first rests on an unlikely assessment of a suspect's response to properly administered clarification attempts, the second contradicts the entire structure upon which *Miranda* was built. Both arguments, however, warrant a closer analysis.

1. Perceived Coercion

Suspects in custody who ambiguously invoke their rights may in fact be the persons most susceptible to police coercion, whether intentional or not.[173] As a result, it has been argued, an individual who believes he has invoked his right to silence, but whose ambiguity subjects him to further clarifying questions, is likely to view such questioning as indicative of the police's intent to dishonor his rights.[174] Thus resigned to believing that the promise of *Miranda* is more ritual than right, such suspects may be inclined to talk begrudgingly where they might otherwise choose silence over speech. Therefore, according to this view, clarification will effectively deprive the most susceptible suspects of the control over the interrogation that the right to silence was intended to permit.[175]

Contrary to this argument, however, properly administered and narrowly limited questions designed to discern a suspect's intent will not likely be viewed as coercive.[176] In fact, it is more likely that such questions will impress upon the individual that the police are prepared to honor his choice but must first determine whether a choice

---

United States, 512 U.S. 452 (1994) (No. 92-1949).

[172] *See* Petitioner's Brief, at 29-30, *Davis* (No. 92-1949); Transcript of Oral Argument at 19-20, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (argument of counsel for petitioner Robert L. Davis).

[173] *See generally* Reply Brief, *Davis* (No. 92-1949).

[174] *See, e.g., Davis*, 512 U.S. at 472-73, in which Justice Souter argued in a concurrence:

> When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could "reasonably," although not necessarily, take to be a request), in contravention of the "rights" just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.

Id. (Souter, J., concurring).

[175] *See* Michigan v. Mosley, 423 U.S. 96, 103-04 (1975) (stating that "[t]hrough the exercise of his option to terminate questioning [a suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation").

[176] Properly administered questions are those administered in accordance with the proposed guidelines. *See infra* text accompanying notes 192-206.

has been made. This realization on the suspect's part should help to dispel a primary cause of ambiguous or vague speech. Social science has confirmed the debilitating effect that the interrogation atmosphere can have on many suspects' ability to assert themselves linguistically.[177] According to one commentator, speakers hedge as a linguistic mechanism to avoid conflict. "The speaker's [language] is delivered as suggestions, innuendoes, implications, insinuations, or inferences. This use of indirect speech patterns in order to avoid conflict is the hallmark of a pragmatic usage [of language] by persons without power . . . ."[178] While the interrogation atmosphere is designed to instill the very feeling of powerlessness that ultimately is often manifested as ambiguous or equivocal speech,[179] clarification may help neutralize that feeling and thereby aid the individual in

---

[177] *See infra* note 174 and accompanying text.

[178] Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 318 (1993); *see also* Davis v, United States, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring). Justice Souter relied on socio-linguistic analysis and stated that "individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant. Suspects in police interrogation are strong candidates for these effects." *See id.* (citing WILLIAM O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 61-71 (1982)). Professor Ainsworth has identified, "hedges" and the use of "modal verbs" as two common types of indirect and tentative modes of expression. *See* Ainsworth, *supra*, at 275-80. Hedges are defined as "lexical expressions that function to attenuate the emphasis of a statement." *Id.* at 276-77. Hedges convey either the speaker's uncertainty or "that the speaker prefers not to confront the addressee with a bald assertion." *Id.* at 276. Examples of hedges include "I think," "I guess," "I suppose," "maybe," and "perhaps." *Id.* Modal verbs include such indefinite terms as "may," "might," "could," "should," and "must." *Id.* at 280. Statements employing either hedges or modal verbs are commonly referred to as "vague" or "ambiguous" by courts, which do not generally recognize such linguistic distinctions. *See supra* note 22. A review of the case law reveals a strikingly frequent use of hedges and modal verbs by suspects whose statements have been found to be ambiguous. *See, e.g., Davis*, 512 U.S. at 455, 459-60 (holding that the words, "Maybe I should talk to a lawyer" are not an invocation); State v. Eastlack, 883 P.2d 999, 1005 (Ariz. 1994) (holding that the words, "I think I better talk to a lawyer first" are not an invocation); State v. Howard, 324 N.W.2d 216, 220-22 (Minn. 1982) (holding that the words, "I don't think I better say anymore — till I have an attorney" are not an invocation); People v. Krueger, 412 N.E.2d 537, 540 (Ill. 1980) (holding that the words, "Maybe I ought to have an attorney" are not an invocation). Reflecting their custodial surroundings, suspects also occasionally make statements that, while not employing hedge words or modal verbs, nonetheless reveal a concern to appease their interrogators. *See, e.g.*, Brown v. State, 630 So. 2d 481, 483 (Ala. 1993) (explaining that the suspect asked, "Is it going to piss ya'll off if I ask for my — to talk to a friend that is an attorney?").

[179] *See* Miranda v. Arizona, 384 U.S. 436, 448-55, 457 (1966) (describing police interrogation strategies designed to "subjugate the individual to the will of his examiner").

more clearly expressing his intent by demonstrating the police's concern for the suspect's ability immediately to cut off all questioning.

In addition, since the ambiguity shifts to police the obligation of framing properly limited questions, the clarification process will further ease the suspect's burden of formulating a "clear" invocation and thus tend to negate the anxiety which may have led to equivocality in the first instance.[180] Questions designed to ascertain "intent" rather than "information"[181] should invite simple "yes" or "no" responses and, thus, far from coercing a suspect to speak against his will, should facilitate the assertion of the right to silence if in fact it is desired.[182]

To further ensure against the possibility of coercion, information obtained by questions exceeding the narrow purpose of clarification would be inadmissible as substantive evidence of guilt.[183] In sum, because properly administered questions should make it easier rather

---

[180] *See* Charles R. Shreffler, Jr., Note, *Judicial Approaches to the Ambiguous Request for Counsel Since* Miranda v. Arizona, 62 NOTRE DAME L. REV. 460, 473 (1987) (recognizing that clarification "shifts some of the pressure of a custodial interrogation from the suspect to law enforcement officials"). It seems plausible to conclude that much of the anxiety created by the custodial atmosphere is that for many suspects, custodial surroundings are unfamiliar territory. *See Davis*, 512 U.S. at 469 (Souter, J., concurring) (recognizing that many individuals in police custody will be "overwhelmed by the uncertainty of their predicament"). For many more suspects, the legal requirement of having to invoke one's rights, and to do so with precision, is even more foreign. *See* Nash v. Estelle, 597 F.2d 513, 516 (5th Cir. 1979) (en banc) (noting that the custodial suspect, unsure of how to invoke the right to counsel, asked whether he had to make a written request).

[181] *See infra* notes 192-206 and accompanying text (discussing appropriate guidelines for formulating clarifying questions).

[182] The recognition that properly phrased questions should invite simple "yes" or "no" responses is not inconsistent with this proposal's guidelines that prohibit questions from improperly suggesting the answer desired by the interrogator. *See infra* text accompanying notes 201-03. While rules of evidence commonly associate "leading questions" with those which invite "yes" or "no" responses, the converse is not necessarily true. *See* MCCORMICK ON EVIDENCE § 6, at 17-18 (4th ed. 1992) (recognizing and criticizing the association of simple responses with leading questions). For example, police officers may routinely seek to clarify a suspect's ambiguity by asking the non-leading, yes-or-no question, "Are you invoking your right to remain silent?" *Id.* (stating that "[t]he whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another."); ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 611.2, at 466 (1996) (defining a leading question as "one which suggests the answer that the questioner wants to elicit").

[183] Suppression of statements obtained in violation of procedural safeguards designed to protect the privilege against self-incrimination would not break new ground. *See* cases cited *supra* note 164; *see also* United States v. Fouche, 776 F.2d 1398, 1405 (9th Cir. 1985) (stating that if police questioning exceeded proper clarification purpose following an ambiguous request for counsel, any directly resulting statement(s) must be suppressed).

than more difficult for suspects to invoke clearly their rights, and because the threat of suppression provides incentive to guard against improper questions, the concern with perceived coercion must be considered to be de minimis.

2. Subtle Manipulation

A related argument against clarification is that the police will subvert the process into an opportunity to influence suspects to forego their rights.[184] This argument is not without appeal.[185] Ultimately, however, it must be rejected, for its underlying premise — that police cannot be trusted to discharge their law enforcement obligations consistent with *Miranda* and its progeny — has ultimately proved false.[186] Moreover, the proposed approach incorporates a number of enforceable guidelines developed from the substantial body of pre-*Davis* case law which followed a clarification rule in the right-to-counsel context.[187] These guidelines both instruct the police on how properly to discharge their duties and serve the evidentiary function of developing the record of the critical exchange between the police and the suspect.

One of the underlying presumptions of *Miranda* is that the police must be relied upon to comply with the legal rules governing custodial interrogations.[188] Indeed, a contrary approach would have

---

[184] *See* Transcript of Oral Argument at 16-18, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (colloquy between Justice Souter and counsel for the petitioner Davis); Nash v. Estelle, 597 F.2d 513, 526 (5th Cir. 1979) (Godbold, J., dissenting) (arguing against the clarification approach in the right-to-counsel context that "officers will seek to find, or even to create, equivocalness where there is none and in so doing force the suspect constantly to reassert his right to counsel."); Matthew W.D. Bowman, Note, *The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney — Determining What Statements or Conduct Should Constitute an Accused's Invocation of the Right to Counsel*, 39 VAND. L. REV. 1159, 1189 (1986) (articulating a similar argument).

[185] *See, e.g.*, Thompson v. Wainwright, 601 F.2d 768, 770 n.2 (5th Cir. 1979) (after an individual stated a desire to make a statement to an attorney before talking to the police, officers informed the suspect that he could tell them just as well and if he told an attorney, that attorney would not be able to tell the police); *see also* Holly, *supra* note 133, at 558-59 (discussing the role of mistrust of police power in the Fourth Amendment context) (citing Tracy Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993)).

[186] *See infra* notes 192-95 and accompanying text.

[187] *See infra* notes 192-206 and accompanying text.

[188] *See* Transcript of Oral Argument at 22, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (comment from the bench explaining "the whole *Miranda* structure, we can just do away with all of it if we must proceed on the assumption that interrogating officials cannot be trusted, because they can always come in and lie and say we gave him *Miranda* rights and he waived.").

the perverse effect of allowing police lawlessness, whether real or imaginary, to curtail effectively the development of procedural safeguards designed to protect constitutional rights. Besides, experience has shown that the presumption is warranted. Indeed, in the many pre-*Davis* years during which the majority of federal courts followed some version of a clarification rule in the right-to-counsel context,[189] there was little, if any, indication of systemic law enforcement abuse of the clarification process.[190] Of course, occasional abuses will always be found.[191] Given the practical and experiential bases for *Miranda*'s underlying presumption, though, there is little warrant for dispensing with the benefits of clarification based on the hypothecated suggestion of isolated police excesses.

To be sure the clarification process must be proposed in a manner designed to reduce the possibility of police overreaching. In order to give substance to that concern, and with due regard for modern police practices that are "psychologically rather than physically oriented,"[192] clarifying questions should be administered in accordance with well-defined guidelines.[193] The proposed guidelines are intended to respond to scenarios that may predictably arise during the clarification process.

Perhaps the most difficult scenario for the police will arise when, following an ambiguous invocation of the right to silence, a suspect responds to the officer's clarifying question by asking the officer what to do.[194] Faced with this situation, the officer's obligation is clear. The police are prohibited from giving legal advice to a suspect.[195]

---

[189] *See supra* note 146.

[190] Assuming the courts are responsive to systemic law enforcement abuses, this is a permissible inference from the large majority of courts that chose to adopt some form of a clarification rule prior to *Davis*. *See* cases cited *supra* note 146.

[191] *See, e.g., supra* note 185.

[192] Miranda v. Arizona, 384 U.S. 436, 448 (1966).

[193] The guidelines proposed incorporate and build upon principals established by those courts which followed a version of the clarification approach in either the right-to-counsel or right-to-silence context prior to the *Davis* decision. *See supra* note 146.

[194] *See, e.g.*, United States v. March, 999 F.2d 456, 458 (10th Cir. 1993) (explaining that, during an interrogation, the suspect asked a police officer, "Do you think I need an attorney?"); United States v. Fouche, 833 F.2d 1284, 1286 (9th Cir. 1987) (noting that, while in custody after being permitted a telephone call to call an attorney but during which the suspect called his wife, the suspect returned to the interrogation room and asked the officer, "What should I do?"). The typical situation envisioned here is when an individual is given *Miranda* warnings, and responds, for example, "Well, I suppose I probably shouldn't say anything," and then stops. The officer seeks clarification by saying, "Do you mean that you wish to invoke your right to remain silent?", and the suspect responds, "Do you think that's a good idea?"

[195] *See* Wisconsin v. Walkowiak, 515 N.W.2d 863, 868 (Wis. 1994); Crawford v.

Not only might the giving of such advice operate to reinforce the suspect's mistaken belief regarding the officer's role in the interrogation process, it would likely also violate the jurisdiction's regulations governing the unauthorized practice of law.[196] Beyond the mandatory *Miranda* warning, the officer should confine his behavior to clarifying, not advising.[197] Thus, if asked by a suspect how to proceed, the officer must explain that he may not provide advice.[198] He should then proceed to clarify the suspect's ambiguity. The officer's response may also, however, permissibly include a reiteration of the *Miranda* warnings.[199] By so doing, the simple expedient of stressing the right to counsel may often impart to the individual that he should turn to a lawyer, not the police, for advice.[200]

Moreover, even in the absence of a question from the accused, the police are prohibited from using the clarification process as an opportunity to dissuade a suspect from pursuing one course of action over another.[201] Questions must not invite discussion of the crime be-

---

Delaware, 580 A.2d 571, 577 (Del. 1990) (stating that while clarifying an individual's ambiguous request for counsel the police may not tender legal advice).

[196] In most jurisdictions the unauthorized practice of law is criminalized as a misdemeanor. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1.3, at 845 (1986). Giving legal advice may be a form of unauthorized practice. *See id.* at 838-39.

[197] *See* Thompson v. Wainwright, 601 F.2d 768, 772 (5th Cir. 1979) (explaining that, while clarifying ambiguous requests for counsel, police are prohibited from debating with the suspect about whether invoking the counsel right would be in the suspect's best interest and may not presume to tell the suspect what counsel's advice would be because "such measures are foreign to the purpose of clarification, which is not to persuade but to discern").

[198] *See, e.g., Fouche*, 833 F.2d at 1288 (noting that, in response to a suspect's question, "What should I do?", the officer explained that he was not a lawyer and could not give advice).

[199] *See Crawford*, 580 A.2d at 577 (suggesting this option, though for slightly different reasons).

[200] *See, e.g.*, United States v. Gonzalez, 833 F.2d 1464, 1466 (11th Cir. 1987) (finding that ambiguity was raised by the suspect's statement that she tried to retain counsel but could not afford the cost dispelled by a subsequent reading of *Miranda* warnings, which provided that counsel could be appointed). As stated, repeating the *Miranda* warnings in this situation would not be intended to serve a "clarification" purpose because prior to proceeding to clarification, the officer must first respond to the difficulty of being asked by the suspect what to do. While the proposed approach would *permit* the officer to respond appropriately to such an inquiry, as indicated in the text, it would not *require* the officer to respond. Thus, if asked by a suspect what to do, under the proposed approach, the police may properly ignore the inquiry and proceed to attempt to clarify the initial ambiguous invocation. While it would seem that the better practice would be to respond quickly to the suspect's inquiry, lest the unanswered question obfuscate the clarification process, this choice is best left to the officer who, without exercising an intolerable degree of discretion, can ascertain which option is best given the particular circumstances before him.

[201] *See* Mueller v. Virginia. 507 U.S. 1043 (1993) (White, J., dissenting from denial

ing investigated[202] and may not suggest, either by form or tone, the answer desired by the interrogator.[203] Clarification is not to be used as a subterfuge for intimidation. Thus, where in response to an ambiguous invocation, the interrogator asks (in a neutral tone), "You don't intend to invoke your right to silence, do you?", the officer has suggested the response to his question, and thereby improperly, if only subtly, attempted to coerce the suspect not to invoke his right.[204] Likewise, where through sarcasm, ridicule, or intimidation a properly formed question suggests by its tone the answer desired by the interrogator, the limited clarification purpose has been exceeded and resulting statements would be suppressed.[205] In sum, the police must

---

of certiorari) (noting that the suspect asked a police officer during interrogation, "Do you think I need an attorney here?" to which the officer responded by "shaking his head slightly from side to side, shrugging, and stating: 'You're just talking to us.'").

[202] *See* Brief for United States at 22, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949). Questions designed to elicit substantive information about the offense under investigation have an investigative rather than clarifying purpose and therefore are irrelevant to the clarification process.

[203] *See* State v. Walkowiak, 515 N.W.2d 863, 870 (Wis. 1994) (Abrahamson, J., concurring) (recognizing that police officers should not use the tone of their voice to manipulate subtly the clarification process).

[204] *See* Blackburn v. Alabama, 361 U.S. 199, 206 (1960) (recognizing that "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition."). See also W.H. Enfield, *Direct Examination of Witnesses*, 15 ARK. L. REV. 32, 35 (1960), in which the author states, in the context of questioning witnesses during trial, that "an otherwise unobjectionable question may become leading merely by the tone or inflection of voice in which it is asked." *Id.* While this Article does not take the extreme position that custodial interrogation should (or could) be conducted in accordance with the rules of evidence applicable to trial examination, it does recognize that the reasons for disfavoring some methods of examination apply equally to the courtroom and station house. For example, one of the reasons for disallowing leading questions during the direct examination of a trial witness is that "a witness, intending to be entirely fair and honest, might assent to a leading question which did not express his real meaning[.]" G. Stephen Denroche, *Leading Questions*, 6 CRIM. L.Q. 21, 22 (1963). Likewise, a closely related danger is that leading questions may "discourage the witness from trying to relate her actual memories in favor of acquiescing in the questioner's version of events[.]" David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1183 n.150 (1992) (citing 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 339, at 459-60 (1979)). The analogy to a suspect who has been "thrust into an unfamiliar atmosphere and run through menacing police interrogation," requires no elaboration. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[205] *See, e.g.*, Transcript of Oral Argument at 26, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949), in which Mr. Seamon, Assistant to the Solicitor General, argued on behalf of the United States:

> [A] tone of voice, as much as the contents of what a police officer says, can tend to influence a suspect either way, and so our position is that the police have to — police officers have to be neutral both in terms of what they say and how they say it.

"play it straight with the question"[206] or else face suppression of evidence obtained as a result. By incorporating these guidelines, and removing the incentive for abusive police questioning, the proposed approach is responsive to the primary arguments that have been asserted against clarification.

CONCLUSION

The importance to the administration of criminal justice of securing admissions of guilt from those suspected of wrongdoing cannot be doubted. Indeed, the procurement and use of confessions as an adjunct to a system of successful prosecutions has been described as "inherently desirable."[207] Yet, the efficacy of confessions will not excuse the methods employed to obtain them. The rule of *Davis* does not adequately heed this admonition. Enshrining a suspect in "rights," which experience shows he may predictably be unable to invoke, bears an unsettling resemblance to the mythic Tantalus who was condemned to stand eternally in water that receded when he tried to drink.

In enforcing our criminal law we have learned the valuable lesson that convictions obtained by depreciating the dignity of the individual will, in the long run, engender a disrespect for the law far more dangerous than the suspects we zealously pursue. Permitting the police systematically to ignore, without inquiry, ambiguous indications of a citizen's desire to stand on his rights and remain silent in the face of accusation will inevitably instill in those affected an open hostility for the law, born of a system perceived as unfair. This Article's proposal was developed with these basic truths in mind. The proposed model provides a reasoned, practical approach to the recurring problem of ambiguous invocations of the right to remain si-

---

Id. Potential examples of the improper use of a sarcastic or intimidating tone are limited only by the creativity of the officer conducting the interrogation. Consistent with the purpose of eradicating improper intimidation, the proposed approach would also prohibit the use of intimidating gestures or other unnecessary or irregular displays of authority, which, when used in conjunction with verbal questioning, create a reasonable probability of influencing an arrestee's decision-making process. *Cf.* Quinn v. United States, 349 U.S. 155, 164 (1955) (broadly construing a congressional investigating committee witness' statement as a claim of privilege and reasoning in part, "It is precisely at such times — when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty — that governmental bodies must be most scrupulous in protecting its exercise").

[206] Transcript of Oral Argument at 19, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949) (quoting Justice Souter).

[207] United States v. Washington, 431 U.S. 181, 187 (1977).

lent while remaining responsive to both law enforcement interests and individual rights.